

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

229

WALTER FORBUSH,

Appellant,

v.

No. 19,760

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM AN ORDER OF THE DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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STATEMENT OF QUESTIONS PRESENTED

The question is whether the appellant is entitled to relief in the nature of coram nobis because the evidence presented below, which was not specifically rejected by the court below, proved that his guilty pleas were induced by promises of leniency, communicated to him by his attorney, which apparently emanated from the trial court and prosecutor.

The above question depends upon whether:

1. Promises of leniency communicated to a defendant by his counsel, under circumstances which cause the defendant to believe that they emanated from the court and prosecutor, can render guilty pleas entered in reliance thereon, involuntary and void.
2. The evidence presented below supported the conclusion that appellant relied upon promises of leniency communicated by his counsel, which he believed emanated from the court and prosecutor, in entering guilty pleas; and that such evidence was not specifically rejected by the court below.

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APPEAL FROM AN ORDER OF THE DISTRICT
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BRIEF FOR APPELLANT

I. Jurisdictional Statement

Appellant's motion filed in the court below, asking the court to vacate or correct the last two of his three consecutive sentences (imposed in 1937) was denied. The court below rendered an opinion, made findings of fact and conclusions of law, and entered an order denying the relief sought by appellant. This appeal was filed pursuant to

28 U.S.C. §1291 (1958), which confers jurisdiction upon this Court to hear and determine appellant's cause.

II. Statement of the Case

On June 28, 1937, appellant was separately indicted on four charges of robbery in Criminal Cases Nos. 59896, 59897, 59898 and 59899. Tr. 163. The charges against appellant in Criminal Case No. 59899 were dismissed a few days later, Tr. 164, and appellant does not recall anything regarding that case. Tr. 9. Appellant was arraigned on June 29, 1937, and pleaded not guilty to the charges in each of the remaining indictments. Tr. 163-64. The records of the District Court indicate that at the time of arraignment appellant was represented by an attorney. Tr. 163. However, appellant testified below that he had no knowledge that he was represented by a lawyer and "... didn't have any lawyer". Tr. 7-8.

On July 2, 1937, appellant's trial in Criminal Case No. 59896 commenced. The records of the District Court state that he was tried by a jury and found guilty. Tr. 165-66. The court records also state that on the same day, July 2, 1937, appellant entered pleas of guilty in Criminal Cases Nos. 59897

and 59898. Tr. 166. On July 3, 1937, he was sentenced to imprisonment for a period of three to ten years in each case, the sentences to take effect consecutively and to begin at the expiration of a sentence pronounced in a previous case in 1935. Tr. 167.

When appellant appeared for trial on July 2, the judge, upon ascertaining that he was unrepresented, requested an attorney present in the courtroom to act as his counsel, which he agreed to do. Tr. 11. The attorney conferred with appellant for a few minutes following which the trial began. Tr. 11. The trial continued for approximately an hour, during which the government presented two witnesses whose testimony was conflicting. Tr. 12, 16, 104. At that point, appellant's counsel told him that he was sick and unable to continue, and would seek a "postponement". Tr. 12-13. His counsel then conferred with the prosecuting attorney who, in turn, conferred with the judge and then informed appellant's counsel that the judge would not delay the trial; that the judge was "going to get this case off the docket." Tr. 13-14. Defense counsel became so ill that he stated he could not continue the trial and that he was going to talk with the prosecutor again. Tr. 14.

After the second conference with the prosecutor, defense counsel inquired whether appellant would plead guilty if a

light sentence could be arranged. Appellant pointed out that he faced two other charges but stated that he would consider guilty pleas if light sentences would be forthcoming. Tr. 14, 147. Defense counsel again spoke with the prosecutor at the latter's table and then both conferred with the judge at the bench. Tr. 14, 152-53. Defense counsel then returned and advised the appellant that it was agreeable that in the event of guilty pleas in each of the three cases, the sentences would run concurrently. Tr. 15, 147, 154-56. Moreover, appellant was assured that he would not receive the legal maximum. Tr. 147.

After defense counsel explained the meaning of concurrent sentences to appellant, appellant stated that he was willing to enter guilty pleas. Tr. 14, 154.

The judge then stopped the trial and polled the jury, who voted a verdict of guilty. Tr. 16-17, 156. Pleas of guilty were also taken in the other two cases. Tr. 17-18.

Appellant was committed to Lorton Penitentiary to serve his sentences. Tr. 20. In 1938, he was transferred from Lorton to the federal penitentiary in Atlanta, Georgia. Tr. 21. In 1946, he was transferred to the federal penitentiary

at Alcatraz, California. Tr. 22. During the time he was incarcerated in Alcatraz, appellant filed two papers with the District Court for the District of Columbia seeking to set aside the 1937 convictions. One was filed in 1946, Tr. 23, and one was filed in 1948. Tr. 24. Both of these documents were prepared by two other inmates at Alcatraz, who, although apprised by appellant of the circumstances of his trial and guilty pleas, concluded that other and better grounds existed for attacking appellant's convictions. Tr. 23-25.

In June, 1949, appellant was transferred back to the federal penitentiary in Atlanta, Georgia. Tr. 25. In August 1950, appellant was released on parole from Atlanta, Georgia. Tr. 26. He went back to his home in South Boston, Virginia, where he opened a modest business, a restaurant. Tr. 26. From 1950 to June 1963, appellant conducted his business successfully, got married, and had two children. Tr. 29.

In 1955, and again in 1960, appellant, with assistance of counsel, filed a petition addressed to the President of the United States for a pardon for his 1937 convictions. Tr. 26-27, 28, 44-52, 63. These petitions were drafted by appellant's attorney and did not contain any reference to the

circumstances surrounding the 1937 trial and guilty pleas. Appellant testified that no mention was made of his present contentions because he was "informed by those two fellows in Alcatraz that there was nothing I could do" about the 1937 occurrences because he "didn't have any records." Tr. 27-28, 29.

In June 1963, appellant was arrested and charged with a federal offense. Tr. 29-30. He was thereafter convicted and incarcerated in the federal penitentiary in Atlanta, Georgia. Tr. 32. While still incarcerated by reason of the 1963 conviction, appellant filed his motion attacking the 1937 convictions in the court below. [Motion filed January 18, 1965] His motion sought an alternative remedy. First, he invoked 28 U.S.C. §2255 (1958), asking the court below to vacate or correct the last two of his three consecutive sentences (imposed in 1937). Alternatively, appellant asked the court below for relief in the nature of coram nobis [28 U.S.C. §1651(a) (1958)].

Present counsel for appellant was appointed by the District Court to represent him for purposes of his motion in the District Court. On June 4, 1965, the District Court ordered a hearing on appellant's motion, which hearing was commenced

on July 2, 1965, and concluded on July 7, 1965. On September 23, 1965, the court below entered an order denying appellant's motion, supported by an opinion and findings of fact and conclusions of law. In the opinion, the court stated, "the remedy by way of the statutory [28 U.S.C. §2255] motion to vacate or modify these sentences is not presently available. But insofar as the petition seeks relief in the nature of coram nobis, it invokes an available and appropriate remedy." [Op., p. 5]

1. At the time appellant filed his motion in the court below, and during the pendency of his cause in the court below he was in federal custody by reason of a conviction unrelated to those for which he sought relief by that motion. Thus, as the court below concluded, Section 2255 relief was not available. See Heflin v. United States, 358 U.S. 415 (1949); Moon v. United States, 106 U.S. App. D.C. 301, 272 F.2d 530 (1959); Thomas v. United States, 106 U.S. App. D.C. 234, 271 F.2d 500 (1959). Since that time, appellant's parole stemming from the convictions here in question has been revoked. However, since he is incarcerated simultaneously on the unrelated conviction and the 1937 convictions, he could not be released from federal custody even if he were to prevail in this case. Therefore, relief under Section 2255 is still not available. See McNally v. Hill, 293 U.S. 131 (1934) (habeas corpus); May v. United States, 261 F.2d 629 (9th Cir.), cert. denied, 359 U.S. 994 (1958); United States v. McGann, 245 F.2d 670 (2nd Cir. 1957) (concurrent sentences). However, relief in the nature of coram nobis is still available. See United States v. Morgan, 346 U.S. 502 (1954); Moon v. United States, *supra*; Thomas v. United States, *supra*; Farnsworth v. United States, 98 U.S. App. D.C. 59, 232 F.2d 361 (1956).

Appellant filed a pro se motion for leave to appeal to the District Court, which motion was granted. On December 14, 1965, on appellant's motion, present counsel was appointed by this Court and the time for filing appellant's brief was extended for a period of 25 days from the date of the order.

III. Statement of Points

A. The court below erred in denying appellant's motion since the undisputed evidence proved that appellant's guilty pleas were void because induced by promises of leniency.

B. The court below erroneously failed to consider that promises of leniency, communicated by defense counsel, under circumstances which caused the appellant to believe that they emanated from the court and prosecutor, rendered appellant's guilty pleas, entered in reliance thereon, involuntary and void.

C. The court below erroneously failed to conclude that appellant relied upon promises of leniency communicated by his counsel, which he believed emanated from the court and prosecutor in entering guilty pleas, thus rendering those pleas involuntary and void.

IV. Summary of Argument

A. THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION SINCE THE UNDISPUTED EVIDENCE PROVED THAT APPELLANT'S GUILTY PLEAS WERE VOID BECAUSE INDUCED BY PROMISES OF LENIENCY.

The crux of appellant's contention is that he was induced by promises of leniency, communicated to him by his court-appointed attorney, to enter pleas of guilty. The court below took a view of appellant's testimony which assumed that the trial judge must in fact have participated in a collaboration with the prosecutor and defense, in inducing pleas of guilty by promises of concurrent sentences in order for appellant to prevail in this case. However, appellant's contention is that he believed a collaboration existed between the judge, prosecutor and defense counsel.

Thus, the factors determinative of appellant's contention are:

1. That promises of leniency communicated to a defendant by his counsel, under circumstances which cause the defendant to believe that they emanated from the court and prosecutor, which induce him to enter guilty pleas in reliance thereon, render those pleas involuntary and void; and

2. That the evidence presented below supported the conclusion that appellant relied on promises of leniency communicated by his counsel, which he believed emanated from the court and prosecutor, in entering guilty pleas; and that such evidence was not specifically rejected by the court below.

B. THE COURT BELOW ERRONEOUSLY FAILED TO CONSIDER THAT PROMISES OF LENIENCY, COMMUNICATED BY DEFENSE COUNSEL, UNDER CIRCUMSTANCES WHICH CAUSED THE APPELLANT TO BELIEVE THAT THEY EMANATED FROM THE COURT AND PROSECUTOR, COULD RENDER APPELLANT'S GUILTY PLEAS, ENTERED IN RELIANCE THEREON, INVOLUNTARY AND VOID.

A conviction based upon an involuntary plea of guilty -- one induced by promises or threats -- is inconsistent with due process of law. Kercheval v. United States, 274 U.S. 220 (1927). Such a conviction is void and subject to collateral attack. See e.g., Machibroda v. United States, 368 U.S. 487 (1962).

Promises or threats vitiate guilty pleas entered in reliance thereon, if the promises or threats are made by a prosecutor, see e.g., Machibroda v. United States, *supra*; a federal officer, see e.g., United States v. Morgan, 346 U.S. 502 (1954); Von Moltke v. Gillies, 332 U.S. 708 (1948); or the court,

see e.g., United States v. LaVallee, 319 F.2d 308, 311 (2nd Cir. 1963).

Guilty pleas entered because of promises of leniency by prosecutor, federal officer or judge, are therefore invalid because they lack the required qualities of voluntariness and full understanding. The importance of these qualities, in the judicial view is underscored by the existence of Rule 11 of the Federal Rules of Criminal Procedure. Moreover, the spirit and content of Rule 11 appears in two important decisions by the Supreme Court of the United States [Von Moltke v. Gillies, supra, and Kercheval v. United States, supra] and has been adopted by the Judges of the United States District Court for the District of Columbia -- the practice in the District Court is to interrogate defendants in criminal cases, to determine that the defendant is entering his plea voluntarily and with full understanding of the consequences, before the plea is accepted.

Although the preceeding discussion indicates that promises of leniency destroy the voluntariness of guilty pleas made in reliance thereon, no case has been found where promises of leniency communicated by defense counsel have been held to vitiate a guilty plea. Such statements made to a defendant by his attorney have been held to be statements of expectation

which cannot vitiate a guilty plea. See e.g., Monroe v. Huff, 79 U.S. App. D.C. 246, 145 F.2d 249 (1944). Even where the purport of such statements that an "arrangement" or "agreement" has been made with the prosecutor or judge, guilty pleas have not been invalidated. See e.g., Thomson v. Huff, 80 U.S. App. D.C. 165, 149 F.2d 842 (1945); Dorsey v. Gill, 80 U.S. App. D.C. 9, 148 F.2d 857 (1945).

One implication from the Thomson, Dorsey, and Monroe decisions is that defense counsel's statements relative to lenient sentences may not be used to claim ineffective assistance of counsel, even if such statements are clear misrepresentations. Even though this factor serves to distinguish appellant's claim from those in the above cases, there is a more important distinction.

The ostensible basis of the Thomson-Dorsey-Monroe rule of "expectation" with respect to plea-entry-inducement, vulnerable to attack, is the lack of direct participation by a prosecutor, law-enforcement officer, or judge in the allegedly inducing statements. If such officials participate in the promises, guilty pleas entered thereon would clearly be vitiated (under the authority of the Machibroda-Morgan-LaVallee

rule, as well as the implication of the Thomson-Dorsey-Monroe rule).

The real basis of the Thomson-Dorsey-Monroe rule is that unsupported statements regarding "agreements" communicated by defense counsel should be viewed by reasonable defendants as "mere expectation." On this basis, if a defense counsel's statements concerning arrangements for leniency were supported by acts and circumstances of the court and prosecutor, the defendant would reasonably be justified in concluding that the promises emanated from the judge or prosecutor. Then, guilty pleas entered in reliance upon his belief would be invalid.

C. THE COURT BELOW ERRONEOUSLY FAILED TO CONCLUDE THAT APPELLANT, IN ENTERING GUILTY PLEAS, RELIED UPON PROMISES OF LENIENCY COMMUNICATED BY HIS COUNSEL, WHICH HE BELIEVED EMANATED FROM THE COURT AND PROSECUTOR, THUS RENDERING THOSE PLEAS INVOLUNTARY AND VOID.

The "arrangement" communicated to appellant verbally by his counsel was also communicated to him by the surrounding circumstances on behalf of the judge and prosecutor. Appellant was justified in believing that the judge and prosecutor had

made the agreement with defense counsel. He had no reason to believe that defense counsel's statements were mere expectations.

In support of appellant's contention as to his belief and reliance on his attorney's statements the following factors, which were presented in evidence in the court below and were not specifically rejected by the court below, exist:

1. Appellant was young and uneducated.
2. The physical condition of defense counsel and the conferences between defense counsel, prosecutor, and judge, combined with appellant's youth and lack of education, caused him to believe what his attorney said and to act thereon.
3. The court records cannot be said to refute appellant's contention in its most significant aspects.

V. Argument

- A. THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION SINCE THE UNDISPUTED EVIDENCE PROVED THAT APPELLANT'S GUILTY PLEAS WERE VOID BECAUSE INDUCED BY PROMISES OF LENIENCY.

With respect to point A, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 7-19, inclusive; 145-59, inclusive; 173-75, inclusive.

Appellant contends and so testified in the court below, that events occurred during the trial in Case No. 59896 which induced him to enter guilty pleas in all the cases then pending against him (although the court records contradict the assertion that a guilty plea was entered in Case No. 59896). Appellant testified that his court-appointed attorney, in the middle of the trial, communicated promises of leniency to be fulfilled if he would enter pleas of guilty. He testified that his attorney represented that these promises emanated from the court and the prosecutor.

The court below, however, refused to accept appellant's testimony as to the pre-plea events, at least in terms of the conclusions stated by appellant. That is, the lower court characterized appellant's testimony as undertaking to portray:

. . . a respected judge inquiring, in the presence of the jury, as to the wish of the accused to admit guilt to three charges of a most serious crime; telling the jury, prior to verdict, that the accused desired to admit his guilt of the offense for which he was being tried; exacting a verdict both unnecessary, in view of the accused's proffer of a plea of guilty, and inevitable, in view of what had transpired within the jurors' full view and hearing; collaborating with the prosecutor and defense attorney counsel in the inducement of three pleas of guilty to robbery by an agreement that concurrent sentences would be imposed; and repudiating the agreement, at sentencing on the very next day, by a diametrically opposed arrangement of the sentences. [Op., p. 13].

Implicit in the above characterization of appellant's testimony is the assumption that the trial judge, in 1937, must in fact have participated in a "collaboration" with the prosecutor and defense, in inducing pleas of guilty by promises of concurrent sentences. [However, cf., Finding No. 4, Appendix to Op.]. This characterization misses the point. Appellant's contention is that he believed a "collaboration" existed between the judge, prosecutor and defense counsel.

The real question is whether, in light of the circumstances existing in the courtroom on July 2, 1937, appellant was induced into entering pleas of guilty by information communicated to him by his attorney immediately after the attorney conferred with the prosecutor and the judge. The uncontradicted testimony in the court below was that defense counsel, an officer of the court, apparently acting as intermediary between appellant and the prosecutor and judge, stated that the prosecutor and judge agreed to give the accused concurrent sentences, less than the legal maximum, if he would enter guilty pleas. Tr. 15, 147, 154-56.

Thus, the factors determinative of appellant's contention are:

1. That promises of leniency communicated to a defendant by his counsel, under circumstances which cause the defendant to believe that they emanated from the court and prosecutor, which induce him to enter guilty pleas in reliance thereon render those pleas involuntary and void; and
2. That the evidence presented below supported the conclusion that appellant relied on promises of leniency communicated by his counsel, which he believed emanated from the court and prosecutor, in entering guilty pleas; and that such evidence was not specifically rejected by the court below.

Whether the judge and prosecutor in fact agreed to such an arrangement is not only unprovable but it is irrelevant. If the circumstances surrounding appellant's decision to plead guilty were such as to induce him to make that decision, it is not significant whether or not promises of leniency were actually made by the judge and prosecutor.

B. THE COURT BELOW ERRONEOUSLY FAILED TO CONSIDER THAT PROMISES OF LENIENCY, COMMUNICATED BY DEFENSE COUNSEL, UNDER CIRCUMSTANCES WHICH CAUSED APPELLANT TO BELIEVE THAT THEY EMANATED FROM THE COURT AND PROSECUTOR, COULD RENDER APPELLANT'S GUILTY PLEAS, ENTERED IN RELIANCE THEREON, INVOLUNTARY AND VOID.

With respect to point B, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 7-19, inclusive; 19-29, inclusive; 47; 53-61, inclusive; 63-72, inclusive; 138; 145-59, inclusive; 162-69, inclusive; 173-75, inclusive.

It is clear that a conviction based upon an involuntary plea of guilty -- one induced by promises or threats -- is inconsistent with due process of law. If the plea was the product of coercion, either mental or physical, or was "unfairly obtained or given through ignorance, fear or inadvertence," Kercheval v. United States, 274 U.S. 220 (1927),

the judgment of conviction which rests upon it is void and is subject to collateral attack. See Machibroda v. United States, 368 U.S. 487 (1962); Waley v. Johnston, 316 U.S. 101 (1942); Walker v. Johnston, 312 U.S. 275 (1941). See also, United States v. LaVallee, 319 F.2d 308, 311 (2nd Cir. 1963).

In Machibroda v. United States, supra, the defendant alleged that the prosecutor had promised him no more than twenty years, a comparatively light sentence, if he would plead guilty. The defendant entered a guilty plea, but was sentenced to forty years in prison. The Court stated that the "guilty plea, if induced by promises or threats which deprived it of the character of a voluntary act, is void." 368 U.S. at 493. See also, Heideman v. United States, 281 F.2d 805 (8th Cir. 1960). Promises or threats by federal officers other than prosecutors, United States v. Morgan, 346 U.S. 502 (1954); Von Moltke v. Gillies, 332 U.S. 708 (1948); Waley v. Johnston, supra; Behrens v. Hironimus, 166 F.2d 245 (4th Cir. 1948); or the court, United States v. LaValle, supra; Smith v. United States, 321 F.2d 954 (9th Cir. 1963); United States v. Berry, 309 F.2d 311 (7th Cir. 1962) (dictum); Euziere v. United States, 249 F.2d 293 (10th Cir. 1957); also vitiate guilty pleas entered in reliance thereon.

Guilty pleas entered because of promises of leniency by the prosecutor, federal officer or judge, are therefore invalid because they lack the required quality of voluntariness and full understanding. The importance of these qualities, in the judicial view, is underscored by the existence of Rule 11 of the Federal Rules of Criminal Procedure which states "The court may refuse to accept a plea of guilty, and shall not accept a plea without first determining that the plea is made voluntarily with understanding of the nature of the charge." (Emphasis supplied). The spirit and content of Rule 11 appears in two important decisions by the Supreme Court of the United States, Von Moltke v. Gillies, supra, and Kercheval v. United States, supra. As stated in Kercheval, 274 U.S. at 223:

A plea of guilty differs in purpose and effect from a mere admission or extra-judicial confession; it is itself a conviction . . . out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. [As cited in Von Moltke, 332 U.S. at 719. See also, id., at n.5].

The spirit and content of Rule 11 has also been adopted by the Judges of the United States District Court for the District of Columbia by a Resolution promulgated June 24, 1959. That Resolution states that the Judges of the Court

believe that before a guilty plea is accepted in a criminal case the defendant should be interrogated by or under the direction of the court to establish a number of facts aimed at determining that the defendant is entering his plea voluntarily and with full understanding of the consequences. One of the items in the list included in this Resolution is "That the guilty plea has not been induced by any promise or representation by anyone as to what sentence will be imposed by the Court."

Although the decisions discussed above and the mandate of Rule 11 of the Federal Rules of Criminal Procedure [see Bryant v. United States, 189 F. Supp. 224 (D. N.D. 1960)] make it clear that a guilty plea is not valid if involuntary and that a plea induced by promises of leniency is involuntary, no case has been found where promises of leniency communicated by defense counsel have been held to vitiate a guilty plea. Such statements made to a defendant by his attorney have been held to be statements of expectation which, even if relied upon by a defendant, will not vitiate a guilty plea. Diggs v. Welch, 80 U.S. App. D.C. 5, 48 F.2d 667, cert. denied, 325 U.S. 889 (1945); Monroe v. Huff, 79 U.S. App. D.C. 246, 145 F.2d 249

(1944); Application of Atchley, 169 F. Supp. 313 (N.D. Cal. 1958). Statements by defense counsel have been held not to vitiate guilty pleas, even where their purport is that an "arrangement" or "agreement" has been made with the prosecutor or judge, Thomson v. Huff, 80 U.S. App. D.C. 165, 149 F.2d 842 (1945); Dorsey v. Gill, 80 U.S. App. D.C. 9, 148 F.2d 857 (1945); United States EX REL. Wilkins v. Barnmiller, 205 F. Supp. 123 (E.D. Pa. 1962).

In Thomson v. Huff, supra, the petitioner's appeal from a denial of his application for habeas corpus was denied. Thomson claimed that he was incompetently represented by counsel who failed to show sufficient interest in his case and who advised him to plead guilty to five charges of housebreaking because "he had already arranged for a light sentence of from two to three years on each case, the sentences to run concurrently." Thomson received consecutive sentences of three to five years on each charge. In deciding against Thomson, the court noted that there was no allegation that Thomson misunderstood the nature of the charges or that he did not knowingly plead guilty or that he was coerced by a judge or prosecutor to enter the pleas. Thus, the court concluded that Thomson's claim was just like those made in Monroe v. Huff, supra, and Dorsey v. Gill,

supra, where it was held in both that "a mere disappointed expectation of great leniency does not vitiate a plea."

In Dorsey v. Gill, 80 U.S. App. D.C. 9, 148 F.2d 857 (1945), the petitioner likewise claimed ineffective assistance of counsel based upon an inducement to plead guilty because of an alleged agreement reached with the prosecutor that the petitioner would go into the armed services if he pleaded guilty. The court concluded that this, as in Monroe, amounted to an allegation that the petitioner pleaded guilty on the advice of his counsel and received a longer sentence than both had hoped. The court noted that in Dorsey, as in Monroe, no allegation was made that the prosecutor had made such representations himself.

An alleged promise of a very lenient sentence because of a personal friendship with the judge was the basis of the claim of ineffective assistance of counsel in the leading case of Monroe v. Huff, 79 U.S. App. D.C. 246, 145 F.2d 249 (1944). The court rejected the argument that Monroe did not intelligently waive jury trial on that basis; rather, the court concluded that he pleaded guilty on advice of his counsel and received a longer sentence than both hoped. Thus, the court reached its later cited conclusion that "a mere disappointed expectation of great leniency does not vitiate a plea." It

should be noted that the petitioner in Monroe, unlike Thomson and Dorsey, did not claim that defense counsel had stated that an arrangement had already been made. United States EX REL. Wilkins v. Banmiller, 205 F. Supp. 123 (E.D. Pa. 1962), involved the same type of allegations as in Thomson, Dorsey and Monroe, i.e., the defense counsel's statements that light sentences had been arranged with the prosecutor and the judge if the petitioner pleaded guilty. In denying relief the Banmiller court pointed out that there were no allegations there or in Thomson, Dorsey and Monroe that any part was taken in the misrepresentation by anyone other than the prisoner's attorney.

One implication from the Thomson, Dorsey and Monroe decisions is that defense counsel's statements relative to lenient sentences may not be used to claim ineffective assistance of counsel, even if such statements are clear misrepresentations. Even though this factor serves to distinguish appellant's claim from those in the above cases, there is a more important distinction.

The ostensible basis of the Thomson-Dorsey-Monroe rule of "expectation" not amounting to plea-entry-inducement, vulnerable to attack, is the lack of direct participation by a prosecutor, law enforcement officer, or judge in the allegedly inducing statements. If such officials participate in the promises,

guilty pleas entered thereon would clearly be vitiated (under the authority of the Machibroda-Morgan-LaValle rule as well as the implication of the Thomson-Dorsey-Monroe rule).

Thus, the next relevant inquiry regarding appellant's claim is whether statements by defense counsel can ever vitiate guilty pleas when there has been no actual verbal communication between defendant and prosecutor, federal officer, or judge. Although not stated in Thomson, Dorsey or Monroe, lack of verbal communication between official and defendant is apparently viewed as justifying the conclusion that statements by defense counsel were those of expectation. Moreover, those decisions are apparently based on the theory that such a conclusion is compelled by the fact that common sense should dictate to most defendants that defense counsel, alone, is not capable of determining what sentence will ultimately be imposed in any given criminal case. Therefore, according to this theory, a court will view unsupported statements by defense counsel regarding "agreements" as statements of "mere expectation", which must be thought, by reasonable defendants, to be statements of "mere expectation."

If the foregoing is the real basis for the Thomson-Dorsey-Monroe rule, which it must be, then, if defense counsel's statements concerning arrangements for leniency were supported

by acts and circumstances of the court and prosecutor, the defendant would reasonably be justified in concluding that the promises emanated from the judge or prosecutor. In such a case, guilty pleas entered in reliance thereon would be vitiated under the Machibroda-Morgan-LaValle rule. For then the defendant's belief that he is to be treated with leniency upon pleading guilty would not be based upon mere statements of expectation as in Monroe, but would be predicated upon the apparent representations of the court or the prosecutor, as in Machibroda or Morgan.

C. THE COURT BELOW ERRONEOUSLY FAILED TO CONCLUDE THAT APPELLANT RELIED UPON PROMISES OF LENIENCY COMMUNICATED BY HIS COUNSEL, WHICH HE BELIEVED EMANATED FROM THE COURT AND PROSECUTOR IN ENTERING GUILTY PLEAS, THUS RENDERING THOSE PLEAS INVOLUNTARY AND VOID.

With respect to point C, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 7-19, inclusive; 19-29, inclusive; 47; 53-61, inclusive; 63-72, inclusive; 138; 145-59, inclusive, 162-69, inclusive; 173-75, inclusive.

Appellant testified below that in 1937 he viewed conferences between his counsel and the prosecutor, and between counsel, prosecutor, and judge. These conferences occurred immediately after appellant and his counsel discussed the possibility of appellant pleading guilty. Appellant was told that his counsel would then discuss the matter with the prosecutor and the court, which he did. Immediately after the consultations, appellant was told by defense counsel that the prosecutor and judge "agreed" that appellant would receive concurrent sentences, less than the legal maximum, if he would plead guilty. Thus, the "arrangement" communicated to appellant verbally by his counsel was also communicated to him by the surrounding circumstances on behalf of the judge and prosecutor. Appellant was justified in believing that the judge and prosecutor had made the agreement with defense counsel. Appellant had no reason to believe that defense counsel's statements were mere expectations.

In support of appellant's contention that he believed promises of leniency emanated from the judge and prosecutor the following factors, which were presented in evidence in the court below and were not specifically rejected by the court below, exist:

1. Appellant was young and uneducated. He was 22 years old. Tr. 47. He had attained an educational level of the third grade. [Motion filed January 18, 1965, p. 4; Tr. 138]. Although he had been to court before, and had "several encounters with the law prior to inception of the cases to which his petition relates" (Op., p. 9), his claim of a fundamental ignorance of legal and courtroom procedures at that time is plausible and uncontradicted.

2. The circumstances occurring in the courtroom on July 2, 1937, warranted a person, such as appellant, in believing his counsel's message of "mercy" and acting thereon. To the uneducated layman, even one who has had experience with the administration of criminal justice by being brought to justice, the power of a judge in regard to accepting "bargains" is not well defined. The link between a criminal accused and his fate is, first, the police officer (or other law-enforcement official); second, his attorney; and, last, the judge. During most of the period from arrest to sentencing, his attorney may be the only voice of authority that speaks to him: If the accused cannot believe what his lawyer says, whom can he believe? Therefore, for appellant to believe his counsel when told by him that he would get concurrent sentences if he pled guilty, was not only plausible, but inevitable. Moreover, the

physical condition of defense counsel and the conferences between defense counsel, prosecutor and judge, combined with appellant's youth and lack of education, caused him to believe what his attorney said and to act thereon. See, e.g., Moore v. Michigan, 355 U.S. 155, 164 (1957) (waiver of counsel and entry of guilty plea by 17-year-old Negro youth of limited education and mental capacity); United States v. Colson, 230 F. Supp. 953, 955 (S.D. N.Y. 1964).

3. The court records cannot be said to refute appellant's contention in its most significant aspects. That these records indicate that appellant was convicted by a jury in Case No. 59896, that a fourth indictment was dismissed, and that appellant's guilty pleas to the charges in Criminal Cases Nos. 59897 and 59898 were accepted at a time later than the trial in Case No. 59896, does not contradict the testimony that appellant was induced to plead guilty by what his lawyer said to him.

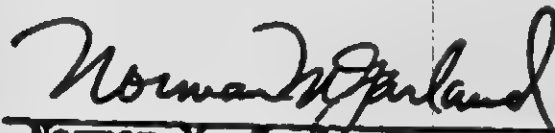
CONCLUSION

Based upon the foregoing, appellant urges that the decision of the court below must be reversed and the cause remanded with instructions that appellant's sentences be

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vacated and he be permitted to withdraw his guilty pleas
in Criminal Cases Nos. 59897 and 59898.

Respectfully submitted,

A handwritten signature in cursive script, reading "Norman M. Garland". The signature is written in dark ink and is positioned above a horizontal line.

Norman M. Garland
1707 H Street, N.W.
Washington, D. C.

Counsel for Appellant
(Appointed By This Court)

APPENDIX

Statutes And Rules Involved

28 U.S.C. 1651(a) (1958):

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 11 F.R.C.P.:

Pleas

A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

Resolution of the Judges of the United States District Court for the District of Columbia, Promulgated June 24, 1959:

RESOLVED, that it is the consensus of opinion of the Judges of this Court that in all cases in which defendant enters a plea of guilty the defendant should be interrogated by or under direction of the Court to establish the following facts:

1. That defendant has been advised and understands that he has a right to a speedy trial by jury with the aid of counsel, but will have no such right if his plea of guilty is accepted.

2. That he will have the assistance of counsel at the time of sentence if the plea is accepted.
3. That defendant understands the nature of the charges against him which should be stated to him in brief by the Court notwithstanding a prior reading of the indictment.
4. That defendant did in fact commit the particular acts which constitute the elements of the crime or crimes charged.
5. That the guilty plea has not been induced by any promise or representation by anyone as to what sentence will be imposed by the Court.
6. That he has not been threatened or coerced by anyone into making the guilty plea.
7. That no promises of any kind have been made to him to induce the guilty plea.
8. That he has an understanding of the consequences of entering the plea of guilty.
9. That he is entering this plea voluntarily and of his own free will because he is guilty and for no other reason.
10. That he has discussed the entry of his plea of guilty fully with his attorney.

IT IS FURTHER RESOLVED, that is [sic], is the consensus of opinion of the Judges of this Court that plea of guilty shall be accepted only when the Court is satisfied that he is guilty and that he is entering the plea voluntarily and of his own free will, and with an understanding of his rights, of the charges against him, and the consequences of entering the plea.

[Footnote to Criminal Rules of the United States District Court for the District of Columbia, Rules Service Co., pp. 347-49 (1961)].

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was personally served upon the United States Attorney for the District of Columbia this 7th day of January, 1966.



Norman M. Garland

BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,760

WALTER FORBUSH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

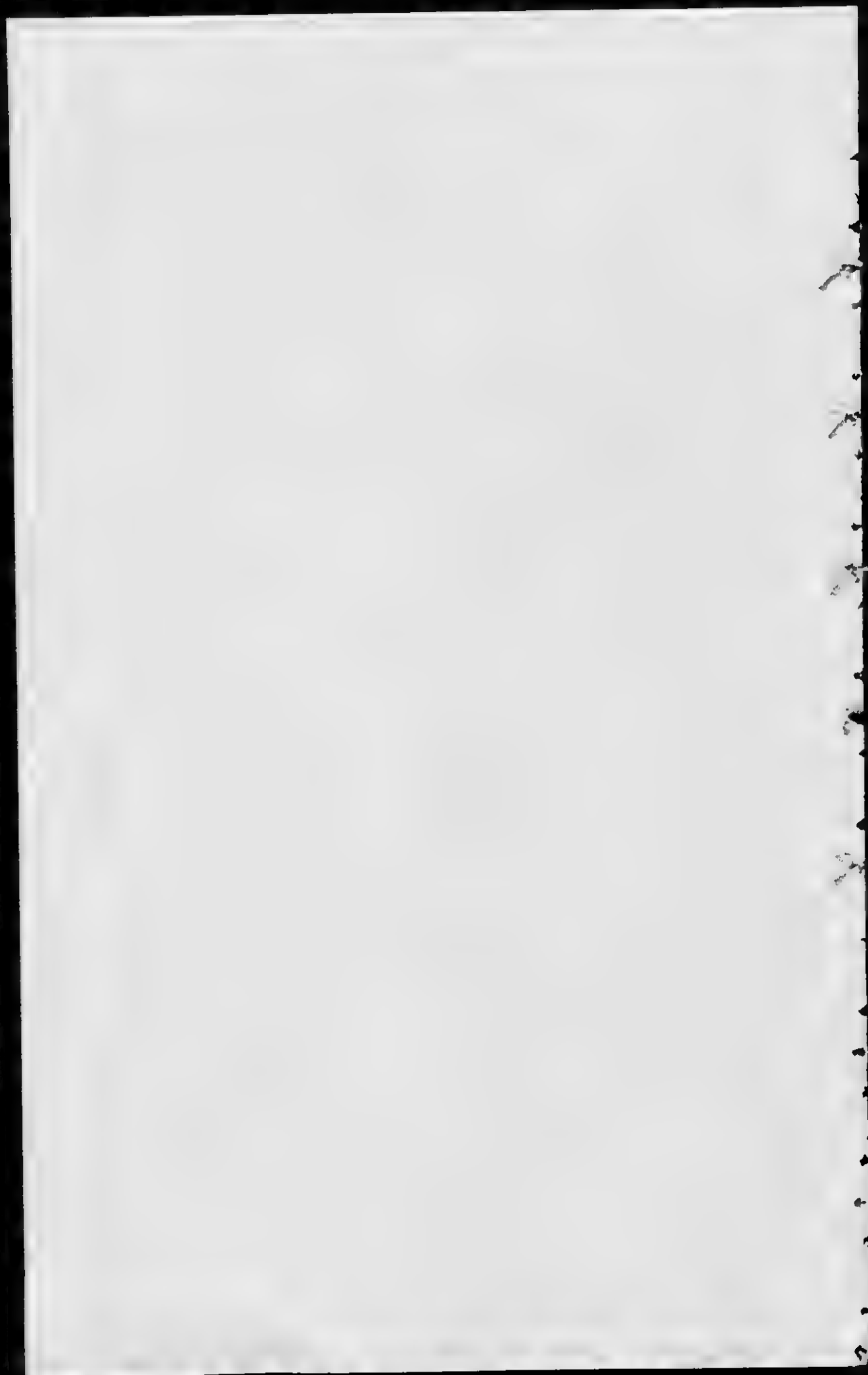
FRANK Q. NEBEKER,
EARL J. SILBERT,
DEAN W. DETERMAN,
Assistant United States Attorneys.

C. A. No. 130-65

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 14 1966

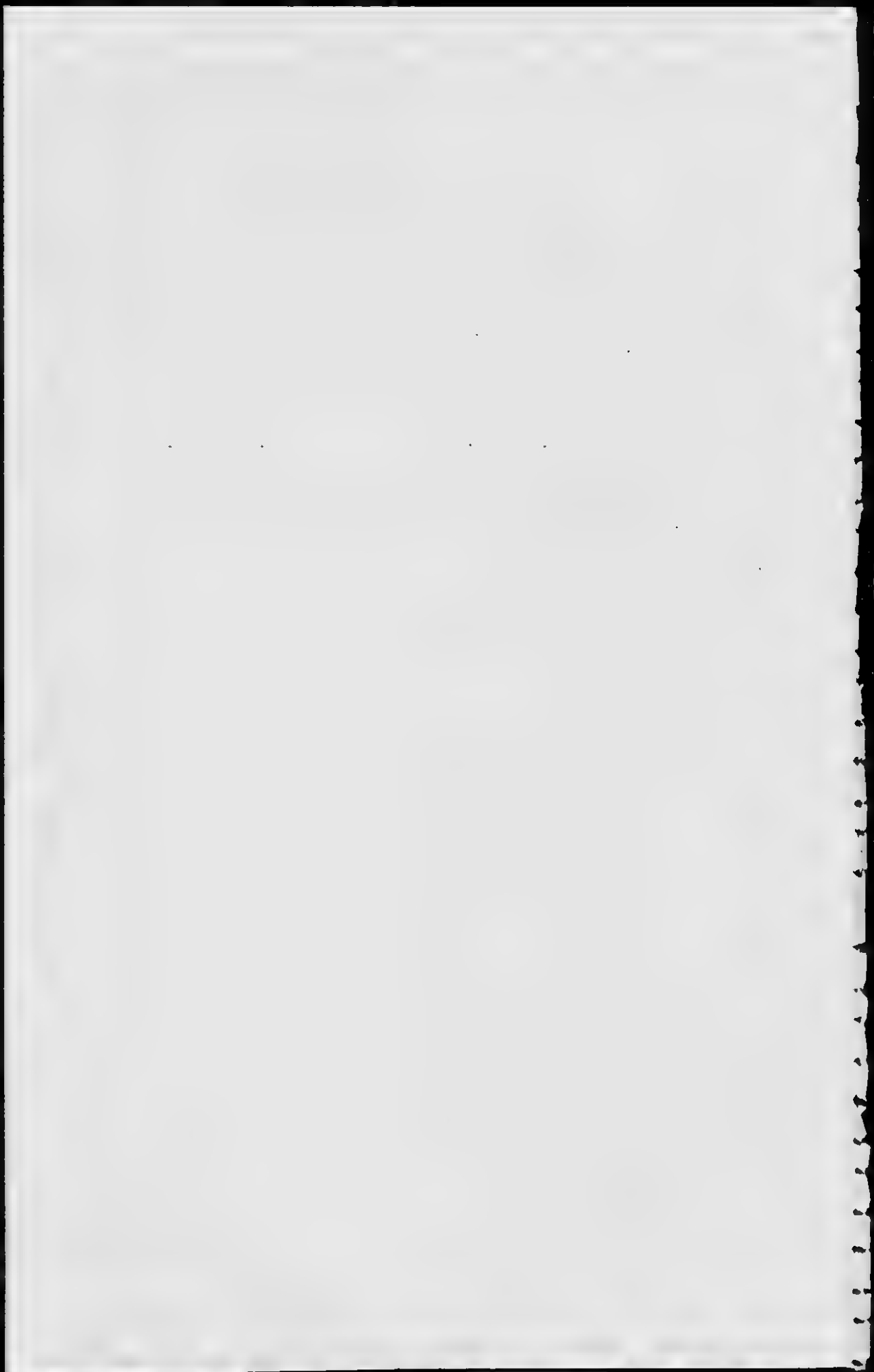
Nathan J. Paulson
CLERK



QUESTION PRESENTED

In 1946, 1948, 1955 and 1961 appellant sought relief from the sentences here challenged, but not once did he mention the bizarre incidents which he now alleges took place in his 1937 trial. His uncorroborated testimony at a hearing on his petition for relief in the nature of *coram nobis* was contradicted in several material respects by court records, and it was self-contradictory in other respects.

On these facts, did the hearing judge err in rejecting all of appellant's testimony and finding that concurrent sentences were never promised to him by anyone, thereby precluding consideration of the issues now raised by appellant?

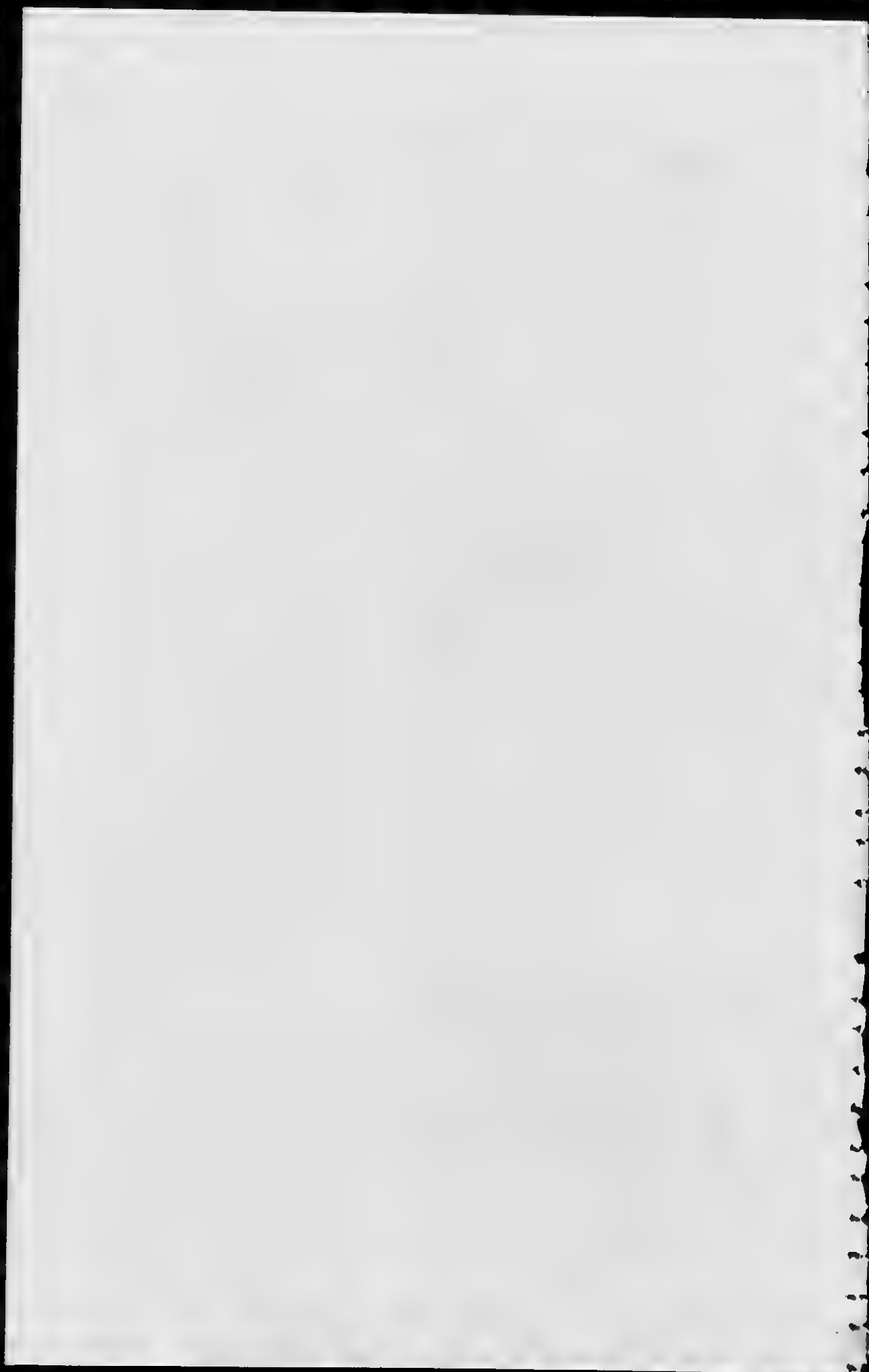


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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,760
(C.A. No. 130-65)

WALTER FORBUSH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant petitioned the District Court for relief in the nature of *coram nobis* (28 U.S.C. § 1651(a)) from three consecutive sentences of three to ten years each.¹ The

¹ Appellant also moved in the alternative for the District Court to correct the two sentences to which he pleaded guilty (28 U.S.C. § 2255); however, appellant now recognizes that this alternative relief is not available because he is no longer in custody or restricted in any way by the sentences here challenged (see Appellant's Brief, note 1 at page 7). The reason that appellant seeks

sentences were imposed by that Court in 1937 following appellant's plea of guilty to two robbery charges and a jury verdict of guilty on another robbery charge. Appellant alleged that these guilty pleas were induced by a promise of concurrent sentences, but the District Court, after a hearing, denied relief and found that

Petitioner understood the nature of such charges and the consequences of entering such pleas. Neither plea was induced by any promise or representation by anyone as to what sentence would be imposed by the Court, and each plea was entered by petitioner voluntarily and of his own free will.²

The District Court authorized this appeal from its order denying relief.

Court records³ indicate that on June 28, 1937, appellant was indicted on four separate charges of robbery (Criminal Case Nos. 59896, 59897, 59898, 59899). On the following day, he was arraigned and entered pleas of "Not Guilty" to all four indictments. At this arraignment and at the trial three days later, appellant was represented by J. Frank O'Brien, a member of the District of Columbia bar.⁴ On July 2, 1937, appellant was tried before a jury on the first charge (Cr. No. 59896), and the jury returned a verdict of guilty. On the same day, appellant entered pleas of guilty to two of the remaining indictments (Cr. Nos. 59897 and 59898) and

any relief at all on these sentences is that, following his parole in 1960, appellant was convicted on another charge in 1963 and may be subject to serving the remainder of these sentences which do not expire until 1971.

² Finding of Fact No. 4, Appendix to Opinion by Robinson, J., filed September 23, 1965.

³ These records include docket entries, records of the Clerk maintained in the Minute Book, and papers filed under the specific criminal case numbers. See especially those records which were read into the transcript in the hearing below (Tr. 163-168).

⁴ Mr. O'Brien was admitted to the bar on October 12, 1933, but his present whereabouts are unknown, and counsel below were unable to contact him.

the Government moved to dismiss the last indictment (Cr. No. 59899). On July 3, still represented by the same Mr. O'Brien, appellant received consecutive sentences of three to ten years in each of the three cases (Cr. Nos. 59896, 59897, 59898), the sentences to commence upon expiration of the sentences earlier imposed in Criminal Case No. 56711.⁵

Appellant was the sole witness in the hearing on his *coram nobis* petition, which was held to determine whether his pleas of guilty in the 1937 trial were induced by a promise of concurrent sentences. All other participants in that trial were either deceased or unavailable. Because appellant's credibility is the only issue on this appeal, i.e., whether the hearing judge erred in rejecting appellant's version of the 1937 trial, this counterstatement will relate relevant portions of his testimony.

Contrary to court records, appellant insisted that he was not represented by counsel during his arraignment (Tr. 6-8), that he was indicted on only three (instead of four) charges of robbery (Tr. 6), that he pleaded guilty to all three without an actual jury verdict on one of the charges (Tr. 16-17), and that no charge was dismissed on motion of the Government after he entered guilty pleas to the others (Tr. 9).

Appellant related a somewhat bizarre version of the 1937 trial. Minutes before the trial began, he testified, the judge selected a lawyer from the back of the courtroom to represent appellant, and they had only a few minutes to confer before the jury was selected (Tr. 11-12, 89-90). After two eyewitnesses to the robbery testified for the Government, appellant's lawyer became ill (Tr. 12-13, 98-100).⁶ Because of this illness, appellant's

⁵ Appellant escaped from Lorton Reformatory after serving almost two years of two consecutive sentences of two to three years each, imposed in Cr. No. 56711 after he pleaded guilty to two counts of robbery in 1935. The 1937 charges were for robberies committed after the escape.

⁶ Appellant later testified that his lawyer had been drinking, had a strong smell of liquor on his breath, and "was under the influence of whiskey" (Tr. 104, 156).

lawyer tried but failed to get a continuance (Tr. 12-14, 99-101). Then the lawyer asked appellant if he would plead guilty, and appellant reminded his lawyer that there were two other pending charges. The lawyer mentioned the possibility of concurrent sentences if appellant would plead guilty to all of the charges.

Appellant gave three separate versions of what happened next. On direct examination (Tr. 14-15), appellant testified that his lawyer talked to the prosecutor, both conferred with the judge, and then his lawyer returned to him and said, "Well, I have informed them that we are going to plead you guilty to this case and to the two pending cases against you. * * * If you plead guilty to this one and you plead guilty to the other two charges, all of them would be run concurrently. * * * You will be sentenced on all of them, but they would run together, you would just have one sentence, you wouldn't have three sentences."

On cross-examination, appellant's version of these events changed somewhat (Tr. 112). He testified that the Government attorney came back and said he would get all of the sentences to run together. He related no conference with the judge. His own lawyer's statement to him was significantly different and much shorter: "It could be a light sentence, but I don't know. I guarantee you won't get the maximum."

Faced with apparently conflicting testimony, the hearing judge closely questioned appellant but he received only a third version in which appellant testified that he could not understand anything his lawyer told him (Tr. 152-157). He also forgot to mention his lawyer's conference with the judge until reminded (Tr. 153).

Afterwards, appellant's story continued, the clerk called appellant before the judge who stated, in the presence of the jury, that appellant wished to plead guilty to the pending charge and two others (Tr. 16, 121). Then the judge announced that the trial on the first charge had already gone far enough for the jury to arrive at some

verdict, so he had the jurors polled and they all said "Guilty." (Tr. 17, 122). On the following day, when the judge sentenced him to consecutive terms, appellant questioned his lawyer who responded, "Well, keep quiet, I am going to straighten it out." (Tr. 17, 124-125). Appellant was imprisoned in several institutions and wrote letters to his lawyer from each, but he received no answer (Tr. 20-22). Copies of these letters were all destroyed (Tr. 22).

On four separate occasions during the past twenty years, appellant has sought relief from the sentences challenged in this appeal. In 1946 and 1948, appellant filed *pro se* motions to suspend sentence and to vacate judgment, respectively. After his parole in 1950, appellant retained counsel who filed two petitions for commutation of sentence with the United States Pardon Attorney in 1955 and 1961. In none of these actions did appellant even mention the bizarre events of his 1937 trial to which he testified below (Tr. 23-25, 27-29).

The only corroboration offered by appellant in the hearing was an allegation that two of the jurors subsequently visited him in prison and expressed surprise that he should have entered a plea of guilty (Tr. 39). Appellant "recognized that they had served on [his] jury, that [he] had seen their faces." (Tr. 39). Court records indicate that while both were on jury service at that time, one of the jurors named by appellant did serve on his jury but the other did not (Tr. 165, 169).

SUMMARY OF ARGUMENT

The legal issues raised by appellant need not be considered because they are based on a hypothetical courtroom situation that never happened. The only issue is whether the hearing judge was correct in rejecting all of appellant's testimony and finding that no inducements or promises of any kind were offered to appellant by anyone in 1937. On this finding of fact, the judge was amply supported by several material variations between

court records and appellant's testimony, as well as by appellant's bizarre version of the 1937 trial which could only be termed "inherently incredible."

ARGUMENT

The hearing judge below had ample support for his finding that neither of appellant's guilty pleas in his 1937 trial "was induced by any promise or representation by anyone as to what sentence would be imposed by the Court."

(Tr. 6-9, 14, 17, 112, 122, 152, 154, 157, 163-166)

Appellant's entire argument on this appeal is based on the premise that he was promised concurrent sentences if he would plead guilty to robbery charges during his 1937 trial, yet the judge below specifically found that appellant received *no* promise or representation from *anyone* (not even his own lawyer at that trial).⁷

The judge's utter rejection of appellant's testimony was based on the complete lack of corroboration for a story that was incredible. Many facts supported this rejection:

(1) This was the first time in more than 28 years that appellant raised this issue although he had sought relief from these same sentences on four previous occasions, twice with assistance of counsel.⁸

(2) Trial counsel was appointed prior to appellant's arraignment in 1937, not minutes before the trial as he testified.⁹

(3) Appellant was indicted on four charges of robbery in 1937, not three as he related.¹⁰

⁷ See footnote 2, *supra*.

⁸ This fact was considered by the hearing judge in his opinion, pages 11-12.

⁹ *Id.* at 10. (Compare Tr. 6-8 with Tr. 163.)

¹⁰ *Ibid.* (Compare Tr. 6 with Tr. 163.)

(4) The Government moved to dismiss the fourth robbery charge after appellant entered guilty pleas to two of the charges, but this is also contrary to appellant's testimony.¹¹

(5) A jury returned a verdict of guilty on one charge, but appellant testified that he entered a guilty plea for this charge.¹²

(6) Perhaps most important, the hearing judge rejected as incredible appellant's entire characterization of the 1937 trial:

Petitioner's testimony, in its most vital part, undertakes to portray a respected judge inquiring, in the presence of the jury, as to the wish of the accused to admit guilt to three charges of a most serious crime; telling the jury, prior to verdict, that the accused desired to admit his guilt of the offense for which he was being tried, exacting a verdict both unnecessary, in view of the accused's proffer of a plea of guilty, and inevitable, in view of what had transpired within the jurors' full view and hearing; collaborating with the prosecutor and defense attorney counsel (sic) in the inducement of three pleas of guilty for robbery by an agreement that concurrent sentences would be imposed; and repudiating the agreement at sentencing on the very next day by a diametrically opposed arrangement of the sentences. This the Court does not accept. "A jury may discount or disregard testimony which runs counter to normal experience." (Citations omitted.) A trial judge, in these circumstances, should do no less.¹³

Clearly, the hearing judge had more than a sufficient basis for disbelieving appellant's entire version of the 1937 trial and for rejecting *in toto* appellant's claim that a promise or inducement had been made. With this well-supported finding of fact appellant's argument on appeal

¹¹ Ibid. (Compare Tr. 9 with Tr. 164.)

¹² Ibid. (Compare Tr. 17, 122 with Tr. 165-166.)

¹³ *Id.* at 13.

collapses, since it depends on a hypothetical courtroom situation that never happened. The law is not at issue here.¹⁴

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
EARL J. SILBERT,
DEAN W. DETERMAN,
Assistant United States Attorneys.

¹⁴ Even if the law were at issue appellant would fail. *Futterman v. United States*, 91 U.S. App. D.C. 331, 332, 202 F.2d 185 (1952); *Thomson v. Huff*, 80 U.S. App. D.C. 165, 166, 149 F.2d 618, 619 (1945); *Monroe v. Huff*, 79 U.S. App. D.C. 246, 145 F.2d 249 (1944). Indeed, appellant's own testimony on the vital question of whether the judge was involved at all was conflicting (compare Tr. 14 with Tr. 112, 152). Moreover, appellant was not certain whether his trial counsel told him anything that was intelligible concerning any promise of concurrent sentences (Tr. 154, 157).

